

Pay to Play

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Social media platforms are at the epicenter of the [attention economy](#). On Facebook, Instagram or Twitter, content creators and advertisers compete for the scarce resource of users' attention. For their part, users do not pay with real money but with their eyeballs. Real money is paid by advertisers. In 2019, Facebook generated \$70 billion from advertising, more than 98% of its total [revenue](#) for that year. Recently, however, there have been signs of a change in the business model of social media platforms. In search of new sources of revenue, Twitter, Instagram and Snapchat are experimenting with paid subscriptions following the model of various types of membership businesses such as Patreon, OnlyFans or Substack. Is this just a passing fad or a longer-term trend? Will the new subscription models be the future of social media, as some [commentators](#) have suggested? And if so, what does this mean for creators and consumers?

In this short essay, I will discuss the emerging trend of social media subscriptions from a consumer law perspective. I will address the topic in four quick steps. First, I will briefly unpack the different types of subscription models that are currently offered by social media platforms. I will then turn to the economic context that pushes social media platforms towards subscription models. In a third step, I will argue that EU law only provides a rather patchy regulatory framework for subscription business models and is lacking clear legal protections for users of subscription-based social media services. Finally, I will suggest several options for updates of the existing regulatory framework with a particular focus on design duties and [regulatory intermediaries](#) such as payment service providers and app stores.

Two Types of Social Media Subscriptions

There are two different types or tiers of subscriptions on social media. The first type is aimed at followers and allows them to subscribe to exclusive content offered by their favorite creators. This category includes so-called Fan Subscriptions on Instagram and Facebook, TikTok Live Subscriptions and Super Followers on Twitter. One prominent example is the "[Twitter Super Follows](#)" feature introduced in September 2021. Recently it was rebranded as "[Twitter Subscriptions](#)". Subscribers get access to exclusive tweets and special subscriber-only spaces where they can engage with their favorite creators. They also get a special Super Follower badge. The subscription fee ranges from 3 to 10 USD. Instagram offers a similar service called "[Instagram subscriptions](#)".

The second type of subscriptions is aimed at content creators or influencers and enables them to increase their visibility on the platform by paying a monthly subscription fee. An example of this type is "[Twitter Blue](#)", which was introduced in 2021 and [relaunched](#) in December 2022. Subscribers can post longer tweets and videos, and their posts get increased visibility in replies and search. In other

words, subscribers to “Twitter Blue” pay for greater reach. The service also features a higher level of account security through two-factor authentication, fewer advertising and the well-known blue check mark. In February 2023, Mark Zuckerberg announced that Meta will introduce a similar subscription service called “[Meta Verified](#)” for creators on Instagram and Facebook. Subscribers to the new service will be verified with a government ID and their accounts will get extra protection from impersonation and hacking. Additional features include access to account support from a real person. Subscribers will also benefit from increased visibility on the platform.

Media reactions to Meta’s announcement have been rather critical. The [Washington Post](#) even argued that Facebook’s new fee-based service is “straight out of Don Corleone’s playbook”. In particular, they criticized that Facebook makes creators pay for security and basic customer service when their accounts get hacked. According to the Washington Post this resembles a mobster-style “protection racket”. This may seem a bit exaggerated. But one could indeed wonder whether reasonable account security and customer service should be basic features rather than a premium service.

Some Economic Context

In a sense, social media platforms are only following a much broader trend towards subscription-based business models. Subscriptions are not a new concept. Book-of-the-month clubs have been around for decades, newspaper and magazine subscriptions even longer. But the past few years have seen subscription-based business models spreading across a broad range of industries – from streaming services (Netflix) and cloud storage (Dropbox), to meal box kits (HelloFresh), beauty boxes (BirchBox) and gaming subscriptions (Xbox Game Pass). There are even entire digital ecosystems based on subscriptions, such as Amazon Prime. One of the reasons why subscriptions are wildly popular especially among venture capitalists is that they provide companies not only with recurring revenue but also deep data about subscribers’ consumption patterns.

In the case of social media, there are also some industry-specific reasons for the shift towards subscriptions. One key factor is the current [crisis of the advertising-based business model](#). Recession concerns and inflation are negatively affecting ad spending on platforms. Also, the new [App Tracking Transparency feature](#), introduced by Apple in 2021, is tormenting Meta, Twitter and Snapchat. Apple’s new opt-in privacy framework requires all iOS apps to ask users for permission to share their data. After the announcement of Apple’s new privacy rules, the stock price of several major social media companies [fell off a cliff](#).

According to some [estimates](#), the change in Apple’s privacy features will cost Facebook \$12 billion in advertising revenue per year. These economic problems are further exacerbated by stricter regulation of online advertising. In the European Union, the [Digital Services Act](#) (DSA) will prohibit targeted advertising aimed at minors (Art. 28(2) DSA) and advertising based on sensitive data categories such as health, religion, ethnic origin or sexual preferences (Art. 26(3) DSA). Against

this background, some social media companies hope that paid subscriptions could offer a viable alternative to the ad-based model. From the perspective of creators, subscriptions aimed at followers offer a new way of monetizing from social media. At the same time, subscriptions may be a tool for increasing user loyalty and engagement.

Social Media Subscriptions: The Current EU Regulatory Framework

A good test case for assessing whether EU consumer law and platform regulation are ready for the subscription economy is the question whether the existing rules make it easy for subscribers to cancel their social media subscriptions.

The first piece of EU law that is relevant in this context is the [Unfair Commercial Practices Directive](#) (UCPD). According to the Commission [Guidance](#) to the UCPD, “traders should follow the principle that unsubscribing from a service should be as easy as subscribing to the service”. More specifically, consumers should not be “forced to take numerous non-intuitive steps in order to arrive at the cancellation link”. Such practices could be considered a misleading or aggressive commercial practice under Articles 7 and 9 UCPD. However, the UCPD only applies to unfair business-to-consumer practices. Therefore, only subscription contracts between creators and their super followers are clearly within the scope of the UCPD. For subscriptions aimed at creators, this is less clear. In many cases, creators will not fall under the consumer definition in Art. 2(a) UCPD.

The UCPD will soon be complemented by Art. 25 DSA which stipulates that providers of online platforms shall not design, organize or operate their online interfaces in a way that deceives or manipulates the recipients of their service. One example of such manipulation is “making the procedure for terminating a service more difficult than subscribing to it“ (Art. 25(3)(c) DSA).” Article 25 DSA applies to the contractual relationship between the platform operators and the recipient of their service. As a consequence, this provision would only apply to the relationship between the platform, say Twitter, and the content creator. In contrast, Art. 25 DSA is not applicable to the subscription contract concluded between the content creator and the Super Follower via Twitter. Even if one would argue that the term “service” includes services offered by third parties via the platform, Art. 25 DSA would not be applicable to “Twitter Subscriptions”, as the UCPD takes precedence over Art. 25 DSA according to Art. 25(2) DSA.

A third piece of EU legislation that may be relevant here, is the [Digital Markets Act](#) (DMA). Art. 6(13) DMA stipulates that gatekeepers shall ensure that termination of core platform services can be exercised without undue difficulty. Recital 63 of the DMA further specifies that unsubscribing to a service should not be made more difficult than subscribing to the same service. However, Art. 6 DMA only applies to designated gatekeepers. The European Commission will designate the first gatekeepers in August or September 2023. It is to be expected that Facebook will

be among them, Snapchat rather not; for Twitter it is still unclear. In summary, the existing EU regulatory framework for social media subscriptions looks rather patchy.

Possible Starting Points for the Regulation of Social Media Subscriptions

This brief overview raises the question of how the regulatory framework for social media subscriptions and for subscription contracts in general could be updated. Here are four areas where law reform might be useful: (1) Positive design duties for easy cancellation (in addition to negative prohibition of dark patterns); (2) Reminders about auto-renewal of subscriptions; (3) Reminders about long-term inactive subscriptions; (4) Stronger focus on the role of regulatory intermediaries such as payment services providers and app stores.

Positive Design Duties for Easy Cancellation

Recently, several member States have introduced new legislation that imposes positive design duties in order to make terminating a subscription as easy as entering into a subscription. In July 2022, the German legislator introduced a “cancellation button” ([§ 312k BGB](#)) that shall allow users to cancel online subscriptions with just two clicks. Similarly, from June 2023 onward, French consumers will be able to cancel certain subscription contracts with the new “bouton résiliation en trois clics” ([Art. L-215-1-1 Code de la consommation](#)). There might be even more buttons in the future. The recent [proposal](#) for the revision of the Directive on distance marketing of financial services suggests to introduce a “withdrawal button” (Art. 16d(5) of the Proposal) that shall facilitate the exercise of withdrawal rights. Certainly, one may criticize this as a new type of techno-legal micro-management and say that we are heading towards a “[buttonization of consumer law](#)”. On a more serious note, however, this new approach rightly acknowledges the importance of user interface design and the fact that in a digital environment “law” needs to be translated into “code”.

This new trend towards positive design duties is also reflected by a recent revision of the California regulations for automatic renewal of subscriptions. [Assembly Bill 390](#), which entered into force in July 2022, requires traders to provide a cost-effective, timely and easy-to-use mechanism for cancellation. This could either be a prominently located direct link, a button or a pre-formulated termination e-mail that the consumer can send without any further formalities. In addition, in March 2023, the US Federal Trade Commission has published a regulatory [proposal](#) that seeks to introduce tightened requirements for subscriptions. Taking inspiration from the California regulations, the new rules would require businesses to provide a simple cancellation mechanism (“click to cancel”).

Reminders About Auto-Renewal of Subscriptions

The new California law on auto-renewals could also serve as a source of inspiration for EU consumer law, with its new duty to send consumers a reminder before the auto-renewal of a subscription or at the end of a free gift or trial period. In particular,

the new rules stipulate that a reminder shall be sent to the consumer at least 15 days and not more than 45 days before the contract automatically renews. This shall ensure that the reminder comes neither too early nor too late. EU law knows such auto-renewal reminders from sector-specific regulation. For example, the [European Electronic Communications Code](#) (EECC) requires businesses to inform consumers in a “timely manner” before the automatic renewal of their contract (Art. 105(3) EECC). This rule could be generalized to cover also subscriptions in other sectors. And for the sake of legal certainty, it might be helpful to clearly specify what a “timely” reminder is.

Reminders About Long-Term Inactive Subscriptions

Reminders might also be necessary in case of long-term inactive subscriptions. In January 2022, the UK Competition and Markets Authority secured [undertakings](#) from Microsoft to contact customers who haven't used their Xbox gaming membership for more than a year and to inform them how to cancel their subscription. Interestingly, the European Commission has indicated in its recent [consultation](#) for the “Digital Fairness Fitness Check of EU Consumer Law” that it is also considering such reminders after a longer period of inactivity.

Stronger Focus on the Role of Regulatory Intermediaries

Finally, it might be helpful to think about the role of [regulatory intermediaries](#) that could play a supporting role in enforcing fair and transparent conditions for subscriptions. One example are payment services providers. In April 2020, the credit card company VISA updated their [subscription billing policy](#). Under the new rules, merchants who want to bill a subscription via VISA have to send a reminder to consumers about the end of a trial period. Moreover, VISA requires merchants to provide an easy way to cancel the subscription online. That's an interesting example of private ordering, almost two years before such requirements were introduced as a mandatory requirement by the California legislator.

More recently, Mastercard, another major credit card company, has followed the model of VISA and also [updated their rules](#) for subscription billing as of September 2022. Mastercard's new rules even go further than the VISA subscription billing policy. It would be interesting to explore whether other payment service providers (like PayPal and ApplePay) have similar policies. But why are VISA and Mastercard concerned about fair and transparent subscription rules? It seems that the answer is the following: They want to reduce the number of chargebacks and consumer complaints because these place an administrative burden upon them. So, some credit card companies are forcing transparency in their own interest. But at the same time, they serve as regulatory intermediaries in helping to enforce fairness and transparency in the subscription economy.

Other regulatory intermediaries could also contribute to effective enforcement of consumer law with regard to subscriptions. For example, the operators of app stores could be required to ensure that they only offer third-party subscription apps that contain a “cancellation button” and that send reminders about auto-renewals to consumers. App stores already have extensive vetting processes in place, in order

to verify that third-party apps comply with their [app store review guidelines](#). It would probably not be too difficult to verify also whether the app complies with EU rules for subscriptions. Such a “design responsibility” for app stores would be in the spirit of Art. 31 DSA which already stipulates that providers of online platforms design their interface in a way that enables traders to comply with their obligations under EU consumer law.

Conclusion

The rise of subscription-based business models in social media is part of a broader trend that can be observed in many industries. Against this background, it is necessary to adapt European consumer law to the new risks of the subscription economy. In view of the upcoming [Fitness Check of EU consumer law on digital fairness](#), the [debate](#) on whether EU consumer law is ready for the subscription economy will most likely gain further momentum of the next few months. Recently, the [European Law Institute](#) has also joined the debate. Further insights are also expected from the [Osnabrück Subscription Observatory](#), a new hub of expertise on the subscription economy which is part of a research project funded by the German Ministry of Consumer Affairs. The proposals briefly outlined above show there are many different starting points for improving consumer protection in the context of subscription models. Design-based solutions such as the „cancellation button“ seem particularly promising. It is not enough to give consumers rights on paper. Nor is it sufficient to inform consumers about their rights in the small print. Effective consumer protection in digital markets requires a user interface design that enables consumers to exercise their rights with a simple click.

